

Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

F. SCOTT STUARD
Martin & Stuard Law Office
Frankfort, Indiana

ATTORNEY FOR APPELLEE:

RICHARD L. LANGSTON
Frankfort, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LINDSEY L. COTTON,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 12A02-0609-CV-783
)	
ANGELA L. (COTTON) STEPHENSON,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE CLINTON CIRCUIT COURT
The Honorable Linley E. Pearson, Judge
Cause No. 12C01-0208-DR-307

February 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Lindsey L. Cotton (Father) appeals the trial court's order granting Angela L. (Cotton) Stephenson's (Mother) petition to modify child custody. Specifically, Father argues that the trial court abused its discretion by modifying custody because there was no evidence that demonstrated a substantial change that would warrant a change of custody and no evidence that the custody modification was in the best interests of the children. Finding no error, we affirm the trial court's order modifying custody.

FACTS

In January 2003, Father and Mother's marriage was dissolved, and pursuant to the parties' custody and property settlement agreement that was incorporated into the dissolution decree, the trial court awarded them joint custody of the parties' two sons: Co.C., born November 3, 1997, and Ch.C., born August 18, 1999 (collectively the Children). Under the agreement, Mother was to have physical custody of the Children from 6:00 p.m. Sunday to 11:30 a.m. Wednesday and Wednesday and Thursday nights, and Father was to have physical custody of the Children the remainder of the week. Father and Mother also agreed that "[n]o support shall be set . . . as each party shall have the children approximately fifty per cent of the time." Appellant's App. p. 13. The parties also agreed that Father would carry medical, dental, and optical insurance on the Children if available through his employment and that the parties would equally divide any of the Children's medical, dental, and optical bills not covered by insurance.

In August 2003, Father filed a "Motion for Clarification Concerning School District[,]" and on August 22, 2003, after conducting a hearing, the trial court ordered

that “[Co.C.] shall attend School at Suncrest Elementary and [Ch.C.] shall be enrolled in the pre-school offered at Suncrest Elementary.” Id. at 3-4. In December 2003, the trial court found Father to be in contempt for “deliberately failing to follow the Court’s order of 8-22-2003[.]” Id. at 5.

On May 17, 2005, Father filed a petition to modify child custody and support, alleging that it would be in the best interest of the Children to modify custody and that there had been a substantial change in circumstances. Specifically, Father alleged that the Children had suffered physical harm and verbal abuse by other people while in Mother’s care. Father also sought a show cause order for Mother to explain why she had not paid her portion of incurred medical bills not covered by insurance. That same day, the trial court appointed a Guardian Ad Litem (GAL).

On September 13, 2005, Mother filed a counter-petition to modify child custody and support, alleging that it was in the Children’s best interests to modify custody and that there had been a substantial and continuing change in circumstances that rendered the existing custody agreement unreasonable. Specifically, Mother alleged that Father continued to disregard the trial court’s August 2003 order regarding the Children’s site of school attendance after being found in contempt of such order, continued to disregard her parental rights, and continued to disrupt the Children’s lives.

In November 2005, the GAL filed his report with the trial court. The report provided that “[w]hile each parent wishes for a termination of the joint custody arrangement and to be awarded sole custody, a termination of the joint custody arrangement is not necessarily in the best interests of the children.” Id. at 26. However,

the GAL stated that “[i]n the event that the parties’ continuing power struggles and lack of communication are factors that persuade the court to terminate the joint custody arrangement, then my opinion would be that mother should have primary custody subject to father’s visitation rights.” Id. at 23. In recommending that Mother be awarded custody of the Children in the event of a modification, the GAL reasoned that “[a]lthough both parents are suitable to be custodial parents, Mother tips the scale in her favor by showing a reasonable plan for sharing time with Father and her desire for cooperation rather than unilateral control.” Id. at 26.

On January 12, 2006, Mother filed a motion to order Father to answer her interrogatories, and that same day, the trial court ordered Father to respond within five days or be held in contempt for failure to comply. On February 7, 2006, Mother filed a motion to dismiss Father’s motion to modify child custody and his motion for rule to show cause, arguing that the trial court should dismiss Father’s motions because he had failed to comply with the trial court’s order to answer Mother’s interrogatories. The trial court granted Mother’s motion to dismiss.

On April 28, 2006, the trial court held a custody modification hearing on Mother’s motion. During the hearing, Father and Mother each testified, and they stipulated to the admission of the GAL’s report. On May 17, 2006, the trial court issued an order, wherein it awarded sole custody of the Children to Mother, granted Father visitation, and ordered Father to pay child support. The trial court’s order provides, in relevant part:

The Court, after hearing the evidence, hereby makes the following ruling: That, pursuant to IC 37-17-2-21, the Court may modify a child custody when the modification is in the best interests of the children and

there is a substantial change in one or more of the factors to be considered under IC 31-17-2-8. The Court finds that [Mother] has established sufficient grounds and facts to support a finding that it is in the best interests of the children to change the custody from that of joint custody to that of [Mother] now having the sole care, custody and control of the two minor children- [Co.C] and [Ch.C.]. In addition[,] the Court finds from the evidence presented that while both parents are fit and proper parents[,] there has been a sufficient change of circumstances to warrant a change of custody. Those changes being: a) the mother has re-married, purchased her home in the school district where the children attend school, has a new daughter with her present husband, and has demonstrated a settled home environment in which to raise the children; b) that the present custody order is not working for the benefit of the children; c) that the mother is better able to confer the necessary time and ability to further the children's educational, medical and social needs[;] d) that the mother would be better able to provide the custodial parent decisions on a daily basis; and e) that the father has demonstrated that he is unable to cooperate in a joint custodial environment making a change of custody necessary for the benefit of the children.

Id. at 32.

On June 14, 2006, Father filed a "Motion to Modify or for Relief from Order[.]" in which Father argued that the trial court failed to consider the statutory factors in Indiana Code section 31-17-2-8 and requested that the trial court recalculate the child support ordered. Id. at 35. On June 16, 2006, Father filed his notice of appeal. Father now appeals the trial court's custody modification order.¹

DISCUSSION AND DECISION

Father argues that the trial court abused its discretion by modifying custody because there was "a complete lack of evidence to support a determination that there ha[d] been a change in one or more of the [custody modification statutory] factors or that

¹ In her Appellee's Brief, Mother disputes the timeliness of Father's notice of appeal and notes that she filed a motion to dismiss challenging the timeliness on November 9, 2006. The motions panel of our court denied Mother's motion to dismiss on December 12, 2006.

modification of custody [was] in the children's best interests." Appellant's Br. p. 10. On the other hand, Mother argues that there was evidence to support the determination that there was a substantial change in at least one of the factors listed in Indiana Code Section 31-17-2-8 and that the modification was in the best interests of the Children.

The modification of a custody order lies within the sound discretion of the trial court. Spencer v. Spencer, 684 N.E.2d 500, 501 (Ind. Ct. App. 1997). "We review custody modifications for abuse of discretion, with a 'preference for granting latitude and deference to our trial judges in family law matters.'" Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (quoting In re Marriage of Richardson, 622 N.E.2d 178, 178 (Ind. 1993)). Our Supreme Court explained the reason for this deference in Kirk:

While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Id. (quoting Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). "Therefore, '[o]n appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal.'" Id. (quoting Brickley, 247 Ind. at 204, 210 N.E.2d at 852).

Indiana Code section 31-17-2-21(a) governs the modification of a child custody order and provides, in part, that "[t]he court may not modify a child custody order unless:

(1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Indiana Code section 31-17-2-8]” When making a determination to modify a child custody order, “the court shall consider the factors listed under [Indiana Code section 31-17-2-8].” Ind. Code § 31-17-2-21(b). Indiana Code section 31-17-2-8 provides:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (1) The age and sex of the child.
- (2) The wishes of the child’s parent or parents.
- (3) The wishes of the child, with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child’s parent or parents;
 - (B) the child’s sibling; and
 - (C) any other person who may significantly affect the child’s best interests.
- (5) The child’s adjustment to the child’s:
 - (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

In an initial child custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating the existing custody should be altered. Kirk, 770 N.E.2d at 307.

During the custody modification hearings, there was testimony that addressed the various statutory factors. Mother testified since the prior custody order, she had remarried and was a stay-at-home mom, which enabled her to be at home when the children got home from school. Appellant's App. p. 95. Mother stated that the current custody arrangement, which was entered when Co.C. was five years old and Ch.C. was three years old, was disruptive to eight-year-old Co.C. and six-year-old Ch.C. because they had to divide their time between two houses during the school week and that they needed a stable environment of coming home to one place and knowing what to expect. Id. at 96. Mother testified that the division between houses had caused problems for Co.C. at school. Specifically, Mother testified that "on more than a couple of occasions[,] Co.C. almost missed a due date for some school projects because Father failed to inform Mother of the school project that Co.C. needed to complete or that Father would not let Co.C. bring a project to Mother's house. Id. at 97. She further testified that Father had failed to send Co.C.'s homework papers that were due on the days that she had physical custody of the Children. Id. at 99. Mother also testified that Co.C. had been experiencing anxiety attacks at Father's house whenever Father screamed at Co.C. for long periods of time, and she introduced a progress note from Co.C.'s February 2006 pediatric visit that documented Co.C.'s breathing problems associated with anxiety when Father yelled at him. Id. at 87-88; Respondent's Ex. A. Finally, Mother testified that

Father was “unwilling to cooperate” and “disruptive” and that the problems with cooperation had made communication “hectic[.]” Id. at 86, 101.

During the hearing, Father admitted that he had violated trial court orders on numerous occasions. Id. at 59-61, 66, 76-77. First, Father violated the trial court’s January 2006 order to answer Mother’s interrogatories, which resulted in the trial court’s dismissal of his motion to modify custody. Id. at 59-60. Father also admitted that he violated the trial court’s August 2003 order when he failed to take Ch.C. to preschool at Suncrest Elementary, and he admitted that even after the trial court found him in contempt for violating that order, he continued to violate it by taking Ch.C. to another school on the days that he did not attend Suncrest. Id. at 60-61. Finally, Father admitted that despite the trial court’s original dissolution decree that required him to carry medical, dental, and optical insurance for the Children if available through his employment, he did not put Ch.C. on his dental insurance and that Ch.C. had some dental “problems[.]” Id. at 66. The GAL report, which was stipulated into evidence, indicated that Ch.C. required a “root canal and tooth extraction.” Id. at 25.

Additionally, as noted above, the GAL noted in his report that “[i]n the event that the parties’ continuing power struggles and lack of communication are factors that persuade the court to terminate the joint custody arrangement, then my opinion would be that mother should have primary custody subject to father’s visitation rights.” Id. at 23. The GAL further indicated that due to Father and Mother’s lack of communication, they needed “instruction or counseling to facilitate the cooperation necessary to maintain an environment that is in the best interest of the children.” Id.

Father's arguments that the evidence presented did not support the trial court's modification order amounts to nothing more than an invitation for us to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. See Haley v. Haley, 771 N.E.2d 743, 747 (Ind. Ct. App. 2002). The trial court saw Father and Mother, observed their demeanor, and scrutinized their testimony as it came from the witness stand. As in Kirk, we are "in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence" or that the trial judge should have found different from what he did. Kirk, 770 N.E.2d at 370. Based upon all of the evidence, we cannot say that the trial court abused its discretion by finding that a substantial change occurred in one of the statutory factors and that modification was in the Children's best interests. Accordingly, we conclude that the trial court did not abuse its discretion by granting Mother's motion to modify custody.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.